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No. 02-1509

IN THE

Supreme Court of the United States

MINISTRY OF FINANCE OF THE REPUBLIC OF INDONESIA,
Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

The Ministry of Finance of the Republic of Indonesia ("Republic") seeks this Court's review of a Second Circuit decision that permitted Respondent Karaha Bodas Company, L.L.C. ("KBC") to attach more than $285 million in revenues belonging to the Republic without a threshold assessment of its power under the FSIA to do so. KBC's brief ("Br. Opp.") is long on irrelevant procedural history, Br. Opp. 2–5, and inflammatory rhetoric, *id.* at 1, 14 (labeling Pertamina "a recalcitrant judgment debtor" and "a deadbeat foreign corporation[ ]"), but short on serious reasons to deny certiorari. KBC's efforts to trivialize this case as a "run-of-the-mill commercial dispute" certainly do not qualify. *Id.* at 14.

KBC concedes, as it must, that the Second Circuit did not decide the Republic's claims of sovereign immunity. *Id.* at 6. KBC likewise acknowledges that the Second Circuit did not decide whether the Retention Fee satisfied the requirement under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602–1611 (2000) ("FSIA") of being "property in the United States." *Id.* at 11.

The Second Circuit's holdings pose not only unmistakable violations of the FSIA that conflict with the decisions of other circuits, they reflect a disturbing disregard for immunity from attachment and execution, which Congress conferred on foreign states in the exercise of its foreign affairs power. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 n.19 (1983). For all these reasons, and because this vital form of foreign sovereign immunity will remain mired in error and conflict without the Court's intervention, the petition should be granted in this case.

ARGUMENT

I. THIS CASE PRESENTS SUBSTANTIAL ISSUES OF FOREIGN SOVEREIGN IMMUNITY.

A. KBC Concedes that the Second Circuit Eschewed Its Obligation to Review *De Novo* the Republic's Claims of Sovereign Immunity.

KBC admits that the Second Circuit refused to review the Republic's claims of sovereign immunity, as required by the FSIA. Br. Opp. 6. That very concession illustrates the need to grant the petition, because the Second Circuit's decision not to review the Republic's FSIA claims presents both an obvious misapplication of the FSIA and a circuit conflict. *See* Pet. 16–17.

KBC struggles against the force of its own concession by insisting that the Republic's claims required no review because "none of the Republic's funds were subject to attachment under the district court's order." Br. Opp. 6. This patently ignores what KBC knows to be true: hundreds of millions of the Republic's revenues have been restrained since February 22, 2002. KBC first states that the Second Circuit separately determined that "Pertamina has an exclusive ownership interest in the portion of the deposits held in its name in New York that constitute the Retention Fee, and that the Republic has no ownership interest whatsoever in the Retention Fee." *Id.* at. 9. KBC then insists that "[t]he attached property consists of funds that Pertamina has an undisputed and exclusive right to retain, and that are on deposit in Pertamina's name, subject to its possession and control, at a bank branch located in New York." *Id.* at 11. In short, KBC argues that the Second Circuit had no need to review the Republic's claims of sovereign immunity because the Republic did not own the attached property.

This argument must be rejected because it rests on a misreading of the Second Circuit's decision.

First, as to ownership, the Second Circuit did not hold that Pertamina owned a portion of the funds in the trust accounts. The court more precisely held that, except for the Retention Fee, the Republic under Indonesian law owned all of the funds because "[l]ike a trustee, Pertamina possesses the remaining funds but has no ownership interest in them." Pet. App. 36a. The court further held that the Retention Fee "*equals* five percent of the Net Operating Income." *Id.* at 20a (emphasis added).

Second, on the question of what property could be attached, the Second Circuit narrowly confined its perspective to New York law, which sanctions the attachment of "'any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested.'" *Id.* at 18a (quoting N.Y. C.P.L.R. § 5201(b)). Stressing that New York law authorizes the attachment of a future interest, *id.* at 36a, the court concluded that Pertamina's future right to payment in Jakarta entitled KBC to attach a portion of the funds in the trust accounts in an amount equal to the Retention Fee. *Id.* at 36a–37a.

Contrary to KBC's contention, then, the Second Circuit refused to discharge its duty to decide (1) whether Pertamina's future right to receive a fee for its services gives it a present right of ownership or control in the gas revenues that constitute the funds in the trust accounts; and (2) whether, even assuming that Pertamina has a future right to the gas revenues in an amount equal to the Retention Fee in Jakarta, the Republic likewise has a present ownership interest in those gas revenues that at a minimum coexists with that future right. Because the court failed to make these determinations, the Republic's funds have been restrained without an adjudication of its sovereign immunity claims.

B. KBC Acknowledges That the Second Circuit Did Not Decide Whether Pertamina's Future Right to the Retention Fee Satisfies the FSIA's Threshold Requirement of Being "Property In The United States."

Faced with the clear text of the FSIA and case law from other circuits holding that before attaching the property of a foreign instrumentality federal courts must determine that such property is "in the United States," KBC invents an "implicit" holding that the Second Circuit never made. Br. Opp. 11. The Second Circuit manifestly made no finding, express or implicit, that the property interest of Pertamina that it found to be attachable under New York law was "in the United States." The court's evasion of that question creates a dangerous precedent that encourages federal courts to avoid difficult issues bearing on a foreign state's immunity from attachment under the FSIA.

As KBC acknowledges, the Second Circuit expressly held that the FSIA did not preclude the attachment of property owned by Pertamina after making findings with respect to only two of the three prerequisites to attachment set forth in 28 U.S.C. § 1610(b).[1] Br. Opp. 6, 7. KBC also concedes that the Second Circuit determined what property was subject to attachment exclusively by reference to state law. *Id.* at 7, 11. KBC's entire defense of the Second Circuit's decision rests on the supposition that by determining that Pertamina's future right to collect a Retention Fee meets the definition of attachable property under N.Y. C.P.L.R. § 5201(b), the court

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[1] The Republic naturally has a stake in the legal errors committed by the Second Circuit to Pertamina's detriment: those errors led to the restraint of property over which the Republic has consistently asserted both ownership and sovereign immunity. Pet. App. 12a, 15a.

"implicitly" rejected the claim that such property was not "in the United States."

The Second Circuit's opinion makes clear, however, that New York law provided no occasion to decide whether the property it found to be owned by Pertamina (a future right to collect a fee) was "in the United States" within the meaning of 28 U.S.C. § 1610(b). The court stated that "any" property of a foreign state—not just property in the United States—could be attached if a waiver and commercial activity in the U.S. were found. Pet. App. 18a. The court decided that Pertamina's property could be attached *exclusively* by reference to 28 U.S.C. § 1606, Rule 69 of the Federal Rules of Civil Procedure, and N.Y. C.P.L.R. § 5201(b), none of which required the court to consider whether the property is located in the United States.[2] Indeed, a companion state law provision allows judgment creditors to enforce against debts "incurred within or without the state," even if payable from a non-resident, and even if "accruing without the state." N.Y. C.P.L.R. § 5201(a). New York law thus licensed the Second Circuit to attach property regardless of its location, although the FSIA prohibits it.[3]

KBC's contention that "it is clear that the attached property is 'in the United States,'" Br. Opp. 8, rests on a misstated definition of the "property" that was attached and a mischaracterization of the evidentiary record and judicial findings. KBC states, without citation, that the "property" the court found to be "attachable" consisted of

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[2] KBC omits limiting language in Rule 69(a), Br. Opp. 2–3 n.2, which provides that "any statute of the United States governs to the extent that it is applicable"—including the FSIA. Fed. R. Civ. P. 69(a).

[3] As the Republic has explained, the amenability of a foreign sovereign to suit—or its property to attachment—is an issue that requires a uniform federal approach, not one based on the divergent requirements of state law. Pet. 25–26.

deposits in New York banks. Br. Opp. 7. The district court, Pet. App. 42a, and by incorporation the court of appeals, *id.* at 11a, held that the property subject to attachment was a "Retention Fee"—a service fee "*equal to* five percent (5%) of the Net Operating Income that is generated from each contract." *Id.* at 42a ¶ 12 (emphasis added); *id.* at 20a. Pertamina's property was assuredly not the "funds" or "deposits" in the New York trust accounts, but rather a statutory fee owed by the Republic "in an amount equal" to a portion of the funds in those accounts. This fee, the court of appeals found, was payable in Jakarta. *Id.* at 20a. The "funds" or "deposits" in New York, on the other hand, were not the property of Pertamina subject to attachment; they were, as the Court found, required "at the direction of the Indonesian government . . . [under] standing instructions to the Trustee" to be paid in full directly to the Republic's account at Indonesia's central bank. *Id.* at 10a; *see also id.* at 35a.[4]

Because the Second Circuit made no determination that the Retention was "property in the United States," KBC's attempts to distinguish the cases now standing in tension with the Second Circuit's decision are unavailing. *See* Pet. at 20–21.[5] In addressing the most pointed

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[4] The Republic maintains that ownership of the funds and the location of the property interests in them are questions of law that must be decided by reference to Indonesian law. Fed. R. Civ. P. 44.1. Indonesia's Constitution and laws establish the Republic's ownership of all the proceeds of its oil and gas resources. Pet. 5. The proceeds are used to maintain its foreign exchange reserves, fund its budget, and pay sovereign debt. *Id.* at 2. The Retention Fee thus gives Pertamina no right, as a matter of Indonesian law, to the proceeds located in New York.

[5] KBC incorrectly asserts that what constitutes "property in the United States" under 28 U.S.C. § 1610(b) is a question of fact. Br. Opp. 11–12. None of the cases cited by KBC supports this contention, as none involves the FSIA. The Fifth Circuit has characterized the

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conflict with *Connecticut Bank*, for example, KBC alleges that the case involved only the "use in commerce" requirement of the FSIA. Br. Opp. at 13. In fact, the Republic of Congo claimed immunity from attachment on two separate grounds: (1) that its property was not "used for" commercial activity in the United States; and (2) that it was not located in the United States. 309 F.3d at 265. The Fifth Circuit underscored that no attachment could occur unless *both* criteria were satisfied, *id.* at 251, and remanded to the district court to decide both issues as an initial matter. *Id.* at 251, 265. The holding of the Second Circuit that no situs finding was required thus squarely conflicts with the Fifth Circuit on an important issue that warrants the intervention of this Court. *See* Pet. 21–22.

II. THE PETITION RAISES IMPORTANT FOREIGN RELATIONS ISSUES.

KBC tries to portray this case as devoid of foreign relations implications by arguing that "[t]he State Department views this as an ordinary commercial dispute that does not implicate any sovereign interests of the United States." Br. Opp. 14. The inference is entirely unwarranted.

KBC's argument is a throwback to the days when a court presented with a claim of sovereign immunity "abided by 'suggestions of immunity' from the State Department." *Verlinden*, 461 U.S. at 487. Turning back

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specific situs issue raised by the petition as posing a "legal question." *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 265 (5th Cir. 2002) (denying rehearing). In any event, a federal court must expressly decide contested facts that underlie its power to make a foreign state or its property amenable to legal process, *see, e.g., Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000) (citing cases), even when the court does not find "any reason to question" those facts. Br. Opp. 7.

the clock would defeat the FSIA's purpose of "discontinuing the practice of judicial deference to 'suggestions of immunity' from the executive branch." H.R. Rep. No. 94-1487, at 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6610 ("1976 U.S.C.C.A.N."). Indeed, Congress enacted the FSIA "to transfer the determination of sovereign immunity from the executive branch to the judicial branch." *Id.* at 6606. Awaiting word from the State Department is unnecessary. The United States has already acknowledged the foreign relations implications of this case—and every case where a foreign state is a defendant—by enacting the FSIA. *See Verlinden*, 461 U.S. at 493 ("Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States . . . .").

Further, the United States seldom intervenes in proceedings in the courts of appeals. Instead, the government characteristically postpones intervention—even in cases brimming with foreign-affairs consequences—until the Court invites the Solicitor General to express the views of the United States.[6] Thus, silence certainly cannot be fairly construed as opposition to the Republic's case. The Court need not rely on a guess regarding the government's position, as KBC does. Instead, the Court may wish to call for the views of the United States.

III. LOWER COURTS AND LITIGANTS NEED GUIDANCE ON THE FSIA'S IMMUNITY FROM ATTACHMENT AND EXECUTION.

The Republic's contention that lower courts and litigants need the Court's guidance in the field of

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[6] *See, e.g.*, Order dated Dec. 10, 2001, *Dead Sea Bromine Co., Ltd. v. Patrickson*, 534 U.S. 1064 (CVSG in an FSIA case); Order dated Nov. 3, 1997, *El Al Israel Airlines, Ltd. v. Tseng*, 522 U.S. 947.

immunity from attachment and execution, *see* Pet. 26, finds unexpected support in KBC's brief. There KBC openly displays its contempt for the principle of foreign sovereign immunity. *See* Br. Opp. 1, 14 (referring to Pertamina as "a recalcitrant judgment debtor" and "a deadbeat foreign corporation[ ]"). This jaundiced view of foreign sovereign immunity ignores Congress's intent that courts inquire routinely into the actual ownership of property held in custody for a foreign sovereign. *See* 1976 U.S.C.C.A.N. at 6627 ("The courts will have to determine whether property 'in the custody of' an agency or instrumentality is property 'of' the agency or instrumentality, . . . [or] whether property held by an agency is property of the foreign state.") (citations omitted).

KBC perhaps forgets that immunity from attachment and execution is a long recognized principle of international comity that Congress deliberately chose to codify in the FSIA. *See* Pet. 5. If KBC disagrees with the wisdom of such immunity, its quarrel is with Congress.

At bottom, KBC's brief reflects a fundamental misunderstanding of litigation against foreign states, a misunderstanding shared by the Second Circuit. Both have failed to grasp that the FSIA demands different treatment for foreign states than for other litigants in proceedings in attachment and execution. Although so widely accepted as to be a truism when applied to immunity from subject matter jurisdiction, this difference has proven confusing for some lower courts when applied to immunity from attachment, as the conflicts posed by the Second Circuit's decision demonstrate. *See id.* at 15–16, 20–22 (describing conflicts regarding the FSIA's provisions governing attachment and execution). Such

conflicts bespeak a need for this Court's guidance, which furnishes an additional reason for granting review.[7]

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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[7] Although KBC states that the Second Circuit's decision was not final, Br. Opp. 7, a post-judgment order is sufficiently final to support appellate review when, as here, it definitively resolves a dispute regarding the attachment of particular property. *See, e.g., Giove v. Stanko*, 49 F.3d 1338, 1341–42 (8th Cir. 1995). In any event, the issue of finality is immaterial in considering whether to grant certiorari, because 28 U.S.C. § 1254(1) gives the Court jurisdiction to grant review notwithstanding the interlocutory posture of a case. *See Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 330–31 (1976). Moreover, with each passing day, the Republic is deprived of its money and, even more importantly, its sovereign immunity. Therefore, "the effect of the [Second Circuit's] order is immediate and irreparable, and any review by this Court of the propriety of the order must be immediate to be meaningful." *Id.* at 331; *see also Gould, Inc. v. Pechiney Ugine Kuhlman*, 853 F.2d 445, 451 (6th Cir. 1988) (immunity under the FSIA includes immunity from "extended proceedings . . . [that] may frustrate the significance and benefit of entitlement to immunity from suit.").